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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 425

MIDLAND NATIONAL BANK OF MINNEAPOLIS,
PETITIONER,

vs.

DAKOTA LIFE INSURANCE COMPANY,
RESPONDENT.

RESPONDENT'S BRIEF.

Statement.

The statements made by petitioner relating to the proceedings in the United States District Court for Minnesota are sufficiently stated.

Pleading.

The contents of the pleadings shown need supplemental statement to show to the court the questions of fact involved in this action.

1. P. XX. The respondent's answer to the amended complaint of the petitioner did allege the conspiracy of Jacobson, Mosher and Doctor Kellogg, to obtain the policy, and to conceal, omit and fail to disclose that Mosher, the insured, was in the final stages of pulmonary tuberculosis (R., 40).

2. P. XXI. Respondent did believe and rely upon the application to issue and did issue to Mosher, the insured, its policy on or about May 14, 1920 (R., 40).

3. P. XXII. The term premium was $108.50; the annual premium required to be paid on November 28, 1920, was $394.20.

4. P. XXIII. Dazey State Bank of Dazey, North Dakota, paid the term premium and all other premiums thereafter paid (R., 40).

5. The application, attached to the policy and made an exhibit of the petitioner's amended complaint, reads: "8. Incontestability. This policy constitutes the entire contract between the parties and shall be incontestible from ITS DATE, except for nonpayment of premiums and, EXCEPT AS OTHERWISE PROVIDED IN THIS POLICY (R., 28). All statements made by the insured shall, IN THE ABSENCE OF FRAUD, be deemed representations and not warranties and no such statement shall void this policy unless it is contained in written application and the copy of such application shall be endorsed upon or attached to this policy when issued (R., 29). I HEREBY AGREE: that this application and the policy hereby applied for, taken together, shall constitute the

entire contract between the parties hereto, AND I HEREBY DECLARE that the contract shall not take effect until the first premium has been paid during my GOOD HEALTH. Oscar Mosher, Applicant. Witness, J. E. Jacobson, Agent" (R., 30).

6. P. XXIX. That in furtherance of said conspiracy, said Mosher, July 17, 1920, did assign said policy to Dazey State Bank of Dazey, North Dakota; that J. E. Jacobson was the president of said bank; that the policy was transmitted to Jacobson and was in the possession of the Dazey State Bank, and H. L. Jacobson, the son, was cashier, and the affairs of the bank were managed by J. E. Jacobson (R., 42).

7. P. XXX. The assignment is given to secure the payment of several promissory notes (R., 42).

8. P. XXXI. The policy was assigned October 10, 1921, by Mosher and Dazey State Bank without authority and without transfer of the notes to Jacobson (R., 42).

9. P. XXXII. There was no debt due by Mosher to J. E. Jacobson (R., 43).

10. P. XXVI. Oscar Mosher died from the disease of pulmonary tuberculosis September 10, 1923, lingering from before being insured to his death from the same disease (R., 41).

11. (Fol. 35) (Form of all assignments, except date): "The foregoing assignment is hereby approved, subject, however, to all the terms and conditions set forth

in said policy. Dated the 2d day of March, 1923. Dakota Life Insurance Company, by J. J. Bell, Actuary." (This assignment was to the Petitioner.) (R., 34.)

Respondent's amended answer to the amended complaint states:

12. P. I. That the policy was assigned by Mosher to Jacobson, as collateral security for debt owing by Mosher to Dazey State Bank (R., 56).

13. P. III. That the amount of the indebtedness was $5,686.08, evidenced by promissory notes executed to said bank by said Oscar Mosher.

14. P. VI. That on January 13, 1923, said debt of Oscar Mosher and Sophia Mosher to said Dazey State Bank had been reduced to the amount of $4,193.84, and no more, and there was no debt due by Mosher to J. E. Jacobson (R., 57).

15. P. VII. States in detail the fraudulent misrepresentation made by one Neal, as agent for petitioner, to Oscar Mosher and Sophia Mosher, his wife, January 13, 1923, while getting the notes for the debt due by the Moshers to the Dazey State Bank renewed and time extended, and in procuring the two $5,000 notes to J. E. Jacobson from the Moshers (R., 57-58).

16. P. X. States that Mosher and J. E. Jacobson made assignment of the policy to petitioner to secure the debt of the Moshers to the Dazey State Bank and for no other purpose (R., 58-59).

17. P. XI. That on June 19, 1923, an action was brought by respondent as plaintiff, in the District

Court of North Dakota, against Oscar Mosher, Dazey State Bank, Harris St. John, as receiver of Dazey State Bank, J. E. Jacobson, and Midland National Bank of Minneapolis, as defendants, to cancel the policy on the ground of fraud (R., 59).

18. P. XXII. That summons and complaint were served on petitioner, and petitioner had full notice of said action, but appeared specially and moved to set aside the said service, claiming the court was without jurisdiction as to it, and it was set aside (R., 59).

19. P. XXIII. Mosher died intestate and resided in Barnes County, North Dakota, and Sophia Mosher, his widow, was appointed administratrix of his estate (R., 59).

20. P. XV. That judgment was given May 12, 1924, by the District Court of North Dakota in favor of Dakota Life Insurance Company and against Sophia Mosher, as administratrix of the estate of Oscar Mosher, decedent, adjudging that policy issued by respondent to Oscar Mosher in the sum of $10,000 be cancelled, annulled and void, and of no effect from beginning (R., 60).

21. P. XVI. That respondent approved the said assignment from Jacobson to petitioner without knowledge of the facts, methods and means whereby petitioner procured said assignment, and if respondent had had knowledge it would have refused to approve said assignment (R., 60).

22. P. XVII. That all of the premiums on the policy were paid by Dazey State Bank (R., 60).

23. P. XVIII. That petitioner has no title or interest in or to said policy by reason of the facts alleged in the answer (R., 60).

24. P. XIV. Respondent denies every allegation contained in paragraph 5 of the amended complaint relating to the assignment by Mosher and Jacobson February 26, 1923, to petitioner, and denies the allegations contained in the 16th paragraph of the amended complaint relating to the performance of all conditions by Mosher or petitioner as required in said policy, and respondent prays that petitioner take nothing in this action (R., 60-61).

25. Paragraph 5 of the amended complaint of petitioner reads: "The company will not assume the responsibility for the validity of an assignment" (R., 28).

The petitioner in its reply to respondent's amended answer to the amended complaint:

26. Par. 1. Admits that J. E. Jacobson on October 10, 1921, was the president of Dazey State Bank; that Oscar Mosher and Sophia Mosher, January 13, 1923, signed two notes for $5,000 each, to J. E. Jacobson; admits that June 19, 1923, an action was commenced by respondent against petitioner in the District Court of North Dakota (R., 59), and admits death of Oscar Mosher and appointment of Sophia Mosher as administratrix of the estate of Oscar Mosher, decedent (R., 62).

27. Par. 5. That petitioner on June 28, 1923, bid in, at public auction, at sale, the two $5,000 notes (R., 63).

28. Par. 6. That petitioner accepted said notes, insurance policy and assignments, and thereafter lent money to said Jacobson and extended credit to said Jacobson and said Dazey State Bank (R., 63-64).

29. Par. 7. Petitioner alleges the fact to be that Sophia Mosher and estate of Oscar Mosher ARE WHOLLY INSOLVENT (R., 64).

30. Wilbur F. Booth, United States circuit judge, acting by assignment, with reference to respondent's amended answer to the amended complaint of petitioner, on application for leave to file respondent's amended answer to the amended complaint of the petitioner, made order granting the motion April 28, 1925 (R., 61), and made the following

"Memorandum.

"The facts alleged in the proposed amendment to the answer to the amended complaint, in my judgment, have a bearing upon the questions whether plaintiff (petitioner) HAS ANY OWNERSHIP in the policy in question, and if it has, whether the ownership is a general or limited one.

"In these respects at least, the allegations of the proposed amended — differ from the allegations of the former answer, which were stricken out on motion.

"Wilbur F. Booth, United States Circuit Judge, Action by Assignment" (R., 62).

31. The following paragraphs of respondent's original answer to the petitioner's amended complaint were,

on motion by petitioner, filed March 6, 1924, ordered stricken, namely: Paragraphs 4 to 6 inclusive, 9 to 11 inclusive, 13 to 20 inclusive, 25 to 28 inclusive, 42 to 45 inclusive, and the words "in furtherance of said conspiracy" in paragraphs 12 and 29, and the words "when and while said Mosher was in good health on payment of the first premium by him" in paragraph 24, and paragraphs 8, 23, 32, 34, 35 and 37 to 51 inclusive, and all that part of paragraph 31 after the words "marked Exhibit B" in the fifth line of said paragraph, and that part of paragraph 36 consisting of the words "but it did so without knowledge of the facts hereinbefore alleged" (R., 50-51).

32. That if it had known at the time of the existence of said things hereinbefore set forth, it would have refused to have approved any of said assignments. Par. XLI (R., 45).

33. Assignment of Error, filed May 3, 1926, in the United States District Court, made by the respondent and plaintiff in error in said district court and in connection with its petition for writ of error, did specify as error, striking parts of the answer, and upon which assignment of error it relies to reverse the judgment rendered against it.

I. II. That the court erred in making its order, filed herein on October 16, 1924, granting plaintiff's (petitioner's) motion to strike all the paragraphs stricken as shown by the order hereinbefore stated (R., 188).

Facts shown by pleadings, oral evidence, written documents, and offer to show by the witnesses sepa-

rately called for respondent, Sophia Mosher, Maxwell Ladbury and J. J. Bell.

1. Oscar Mosher, the insured, died September 10, 1923 (R., 25; Par. 13).

2. The estate of Oscar Mosher and Sophia Mosher, the widow, were wholly insolvent (R., 64; Par. 7, petitioner's reply to amended answer).

3. Dazey State Bank was closed and placed in the receiver's hands February 26, 1923 (R., 95; Test. Mattson).

4. The policy was assigned as security for the payment of the two $5,000 notes February 26, 1923, acknowledged February 27, 1923, before Rudolph C. Jacobson, notary public, and son of J. E. Jacobson, and assignment was approved at Watertown, South Dakota, March 2, 1923 (R., 33-34).

5. The two $5,000 notes were obtained January 13, 1923, from Oscar Mosher and Sophia Mosher to J. E. Jacobson and endorsed by payee and transmitted to petitioner and received March 2, 1923 (R., 79-81).

6. Edgar L. Mattson, witness for petitioner, on direct examination, testified being vice president of petitioner bank (R., 79).

The notes were transmitted by mail (R., 81).

J. E. Jacobson was president of Dazey State Bank (R., 86).

Foreclosure sale of pledged notes was made June 23, 1923 (R., 93).

No advance was made by petitioner bank on the two $5,000 notes (R., 93-94).

Q. Yes, but I say, at the time these two notes and the policy was assigned to your bank, was there any separate collateral agreement covering those, executed by you and Mr. Jacobson?

A. There was nothing additional taken at that time (R., 95).

7. Edgar L. Mattson, witness for petitioner, on cross-examination, testified:

Primarily, Mr. Sharpe, our assistant cashier, who had under him the principal man, Mr. C. B. Neal, looked after the collections of the collateral notes held for the payment of the Dazey State Bank and J. E. Jacobson obligations in the winter of 1922-1923 (R., 102).

A note for $2,010.86 as collateral came to the bank (R., 103).

Do not know when Exhibit "C" (assignment of policy) was received at the bank (R., 104).

C. B. Neal was acting as the field collector for the bank under the supervision of the officers of the bank (R., 105).

8. Clarence B. Neal, witness for petitioner, testified on direct examination:

I and Rudolph Jacobson were at the home of Oscar Mosher and Sophia Mosher, January 13, 1923.

I signed as a witness the original, at the time it was signed, of Exhibit 1, chattel mortgage securing the pay-

ment of a note of $2,010.86 to Dazey State Bank, as collateral security for the Midland National Bank.

Also signed as a witness the original chattel mortgage given by Sophia Mosher of Exhibit 2, to secure the payment of $1,646.49, on January 13, 1923.

Also signed as witness the original mortgage, shown by Exhibit 3, to the signature of Sophia Mosher, January 13, 1923, for $1,500.

The three notes were signed at that time by Oscar Mosher and Sophia Mosher with defendant's Exhibits 1, 2 and 3, made to secure the payment thereof.

No papers were written at the home; they were simply signed.

The papers were written up before by Jacobson and were given to me by Mr. Jacobson.

I was in the employ of the Midland National Bank for some time prior to that time.

I was operating and obtained direction for my work from J. H. Sharpe, assistant cashier, before January 13, 1923, for about sixty days.

The note of $2,010.86 was the only note that I obtained for Midland National Bank (R., 106 to 108).

9. Respondent offered in evidence Exhibit 4 (Findings, conclusions and judgment in North Dakota action canceling policy).

The offer was objected to as immaterial and irrelevant, and was sustained. Exception taken (R., 109).

The judgment was certified to and authenticated by the clerk, judge and clerk, October 6, 1925 (R., 175-176).

Findings of fact and conclusions of law recite that action was brought by Dakota Life Insurance Company *vs.* Oscar Mosher, Dazey State Bank, a corporation; L. E. Baird, as receiver of Dazey State Bank; J. E. Jacobson, Midland National Bank of Minneapolis, Minnesota, and Sophia Mosher, as administratrix of the estate of Oscar Mosher, defendants (R., 177).

That service was made on Oscar Mosher, who did not appear and was in default, and died later, and that Sophia Mosher was substituted as administratrix of the estate of Oscar Mosher.

That the said action was tried on the issues, by hearing and considering testimony submitted by depositions of John B. Hanten, Sophia Mosher, Edgar Ladbury and Doctor J. L. Livingston, and on Exhibits #1 to #12, inclusive (R., 177-178).

Par. V. That policy was sent June 10, 1920, to plaintiff's local agent, J. E. Jacobson, at Dazey, North Dakota, for delivery on payment of premium of $108.50 (R., 179).

Par. VI. That Oscar Mosher made no payment of any premium and the possession remained in J. E. Jacobson until assignments were made, and Oscar Mosher did not know by whom the premium payments were made on the said policy (R., 179).

Par. VII. That at the time of the issue of the policy and before making the said application for it, Oscar Mosher, and ever since and thereafter, was afflicted in an advanced state with tuberculosis of the lungs and was not in good health and knew his condition of health

was not good at the time said application was made and transmitted (R., 179-180).

Par. VII½. That the policy was canceled and nullified by mutual agreement of the parties thereto; that Oscar Mosher later died from the disease of consumption (R., 180).

Par. VIII. That the insurer (plaintiff company) had its first knowledge and information of this condition of the health of Oscar Mosher before, at the time and thereafter, as to the issue of said policy, on May 19, 1923 (R., 180).

Par. IX. Premium payments were made to May 21, 1923, of $1,102.20 (R., 181).

Par. X. That plaintiff, the insurer, rescinded, June 1, 1923, and this rescission was consented to and the policy canceled, on condition that the amount of the premiums paid on the said policy be offered and returned to the party making the payments of the premium (R., 179-181).

Conclusions of the court:

Par. II, are that plaintiff pay into court $1,102.20 and interest (R., 181).

Par. III, plaintiff have judgment in its favor and against Oscar Mosher and Sophia Mosher, as administratrix, adjudging and decreeing policy numbered 18260, for the amount of $10,000, canceled and void from beginning, April 8, 1924 (R., 182).

Judgment was dated May 12, 1924, and ordered and adjudged and decreed that policy numbered 18260, is-

sued by Dakota Life Insurance Company upon the life of Oscar Mosher, in the amount of $10,000, be canceled, annulled and adjudged to be void and of no effect from beginning (R., 182 to 184).

10. Exhibit 5, note for $1,500, dated January 13, 1923, signed by Oscar Mosher and Sophia Mosher to Dazey State Bank, written across the face of the note, "Collateral to note $1,093.75, 9-1-23, $200.00 demand," endorsed Dazey State Bank, by J. E. Jacobson, president. Pay to the order of Ed. Ladbury without recourse. First National Bank, Fargo, North Dakota, by E. V. Bassett" (R., 184).

11. Exhibit 6, showing letterhead of Dazey State Bank, dated January 20, 1923, addressed, Mr. Oscar Mosher, Dazey, North Dakota. Dear Sir: I am sending you a note for $682.98, which kindly sign. Also please have your wife sign it with you. This was the difference in settling with the Dazey State Bank on the former notes of yours, and this will make the correct amount in order to balance the books of the Dazey State Bank. Will you kindly sign this note, so that we can get it back by return mail? Yours truly (signed), J. E. Jacobson, R. E. J. (Written on side: $682.98, Jan. 13-23.) (R., 185.)

12. Defendant's Exhibit 7, heading, Midland National Bank, dated March 5, 1923, addressed, Mr. Oscar Mosher, Dazey, North Dakota. Dear Sir: *Re* Note signed by yourself and Sophia Mosher. We are advised that the Dazey State Bank, Dazey, North Dakota, has closed, and this will inform you that we are

the holders of your note of $2,010.86, dated 1-13-23, and due 10-15-23, as security to the indebtedness of said bank, asking for payment. Please get in touch with our agent, Mr. C. B. Neal, who is now at Dazey, at once and let him know just what your intentions are. Yours very truly (signed), J. H. Sharpe, assistant cashier (R., 185-186).

13. Defendant's Exhibit 1 shows chattel mortgage made by Sophia Mosher to Dazey State Bank, securing the payment of $2,010.86 on note dated January 13, 1923, due October 1, 1923, witnessed by C. B. Neal and R. C. Jacobson, January 13, 1923 (R., 163-165).

14. Defendant's Exhibit 2 shows chattel mortgage by Sophia Mosher, securing the payment of $1,646.49 on note dated January 13, 1923, due November 1, 1923 to J. E. Jacobson, witnessed by C. B. Neal and R. C. Jacobson (R., 167-169).

15. Defendant's Exhibit 3 shows mortgage made by Sophia Mosher, securing the payment of note for $1,500 to Dazey State Bank, witnessed by C. B. Neal and R. C. Jacobson (R., 171-173).

16. Petitioner's Exhibit A and notice of sale shows sale, June 23, 1923 (R., 159), and in Exhibit A the notes of Oscar Mosher and Sophia Mosher, dated January 13, 1923, each for $5,000, and the policy in suit, are mentioned, and "The Dakota Life Insurance Company has served notice demanding the cancellation of the above policy, on the ground that it was obtained through misrepresentation" (R., 162 bottom; 163, top).

17. Respondent had Sophia Mosher sworn, and the witness testified:

I reside on a farm near Dazey, North Dakota.

Have lived there 26 years.

I am the widow of Oscar Mosher.

I am acquainted with C. B. Neal, Rudolph Jacobson and J. E. Jacobson, who came to our place on the farm January 13, 1923, about nine or ten A. M., and stayed a half or three-quarters of an hour. My husband was up at the time. No papers were written at our home. The papers were signed that day by my husband and myself. I was present when the papers were signed by Mr. Mosher and myself (R., 110).

18. The petitioner objected to the witness testifying about the transaction, stating that there was a question if it had any bearing upon the case. The respondent asked to be permitted to offer orally in court the facts which the respondent would establish by this witness, and the court granted permission to make said offer (R., 114).

19. We offer to show by the witness on the stand, that at the time the notes were signed, there was a reference made to renewing the paper for the coming year on the obligation that existed on the part of Oscar Mosher and Sophia Mosher to the Dazey State Bank and to J. E. Jacobson (R., 114-115).

20. Defendant's Exhibit 5 was marked for identification, being note for $1,500, dated January 13, 1923, payable to the Dazey State Bank, signed by Oscar Mosher

and Sophia Mosher; that it was afterwards endorsed by the Dazey State Bank by J. E. Jacobson, president, and again endorsed by the First National Bank, Fargo, North Dakota, pay to the order of Ed. Ladbury, without recourse, and that said note was settled for and paid by this witness; that the chattel mortgage was made to secure said note on the same date and witnessed by C. B. Neal and R. C. Jacobson.

At the same time there was a note executed for $2,010.86 to the Dazey State Bank, signed by Oscar Mosher and Sophia Mosher, endorsed by the Dazey State Bank, and a chattel mortgage made to secure the payment on the same date, witnessed by C. B. Neal and R. C. Jacobson.

Also, at the same time, there was a note made for $1,646.49, signed by Oscar Mosher and Sophia Mosher, payable to J. E. Jacobson at Dazey, North Dakota, secured by a mortgage (R., 115).

Respondent also offered to show by this witness that there was a note signed in the amount of $682.98 to Dazey State Bank by Oscar Mosher and Sophia Mosher, defendant's Exhibit 6, that the same was transmitted by letter, mailed from the Dazey State Bank, and received through the United States mail, and with that note there was a letter, being defendant's Exhibit 6; that this Exhibit 6 came into her possession after her husband's death as administratrix of his estate, and was found in their home on the farm out of Dazey, North Dakota; that this note was signed by Oscar Mosher and Sophia Mosher and returned to the Dazey State Bank, and that demand for payment was

afterward made on Sophia Mosher. Said note is not paid and is in the possession of the receiver of closed banks of North Dakota (R., 116-top 117).

Respondent also offered to show by this witness, defendant's Exhibit 7, letter demanding payment of the $2,010.86 note, which was found among the papers in her home after the death of her husband.

Respondent also offered to show by this witness that at that time there was only one statement made when the notes were signed, and that was that they were the notes to secure the renewal of the notes for the amount that was due to the Dazey State Bank and J. E. Jacobson at that time, and that the papers were laid on the table for signing. That the two $5,000 notes had revenue stamps on, canceled May 22, 1922 (R., 117).

That the notes lying on the table were then signed; that there was no statement made of any $5,000 notes to be signed, and there was nothing stated as to the amount of $10,000 being turned over, or that there was any amount of that kind due from Oscar Mosher or from Sophia Mosher; that the two $5,000 notes were not called to their attention, and that Oscar Mosher and Sophia Mosher did not receive any consideration for the said notes (R., 118).

Respondent further offered to show by this witness that there had been no prior debt of Oscar Mosher or Sophia Mosher for which these two $5,000 notes were made; that all that the Dazey State Bank and J. E. Jacobson had against them at that time was about $5,500; that their property consisted of machinery, horses and cattle, and that the total value of that prop-

erty was far less than the amount of $5,500 that they owed to the Dazey State Bank and J. E. Jacobson; besides that, they were indebted to the First National Bank of Valley City to the amount of around $3,500; that they had a farm, and this was foreclosed by J. E. Jacobson February 13, 1915, and the time of redemption expired February 13, 1916, and the farm was leased to them by J. E. Jacobson, and that they paid rent every year for the said land (R., 118-119).

Par. XXIII. Defendant's Exhibit 10 was marked for identification, being authenticated bill or statement of notes relating to Dazey State Bank account against Oscar Mosher and Sophia Mosher, and showing all notes paid except three, one for $2,010.86, one for $1,500 (later paid, shown by Exhibit 5, R., 184), and one for $682.98 (R., 119).

Par. XXIV. Respondent offered to show by J. J. Bell, witness for it, that he was actuary of the company; that he approved this assignment; that he was not aware of any of the offenses that existed, or might exist relating to the said policy for $10,000, and was not aware of the two notes aggregating $10,000, made without consideration, or were executed without the knowledge of the signers, or that the signing of the same had been procured by a trick or deception; that he believed at the time that the notes were genuine and that he would not have approved the said assignments if he had known the facts relating to the making of the said notes (R., 119-120).

Par. XXV. Respondent offered to show by the witness, Maxwell Ladbury, that he had a conversation with C. B. Neal, agent of the petitioner, and the party was present at the time the notes were executed on January 13, 1923, being two $5,000 notes and the three other notes; that this conversation between the witness and C. B. Neal took place in the hotel at Dazey, North Dakota, during the fall of 1923, and this was the only conversation he had with him about the transaction at the farm home, January 13, 1923; and C. B. Neal stated that these papers were all prepared and taken out to the farm; that they went there to get them signed; that the papers were signed and they left; that before they went out there he had the opinion that these two $5,000 notes were of no account and that he doubted that they would be signed, but after he got there the notes were signed; they were taken up and brought to Dazey, North Dakota (R., 120).

Petitioner objected to the offer made by the respondent, on the ground that said testimony was immaterial and irrelevant matter and that it did not sustain the contention of fraud. The court sustained the objection (R., 121-122).

Par. XXVI. Respondent asked to strike from the evidence Exhibits D and E, being the two $5,000 notes, on the ground that the same were not admissible as evidence, no stamp tax having been affixed thereto; that stamp tax affixed appear to have been canceled May 22, 1922; that the notes are the notes for which the assignment was secured, and that the evidence be stricken

from the evidence. The motion was denied by the court (R., 122).

Respondent also asked the court to hold that the evidence is not sufficient, considering the evidence that has been offered and admitted for the respondent; that there was not any consideration for the making of the said notes to the maker; that the bank did not advance any payments, time of payment was not extended, and that the bank did not part with any consideration in obtaining the said assignment, on which request the court did not rule (R., 122).

ARGUMENT.

Reviewing briefly the facts presented, and inferring therefrom, I call your attention to the existing parties and their actions.

Oscar Mosher, the insured, in May, 1920, was a tenant farmer on a farm some distance from Dazey, North Dakota, and was sick from pulmonary tuberculosis. His family consisted of his wife, Sophia, and children. He did own horses, cattle, machinery, feed and household furnishings of the value of about $3,500. He did owe Dazey State Bank $5,600, and his personal property was mortgaged for payment of his debts. He did owe a bank at Valley City about $3,500. He was insolvent and his estate was insolvent, and his wife, Sophia, was insolvent.

J. E. Jacobson in 1920 (now dead) was a banker at Dazey, North Dakota, president of Dazey State Bank, owned and managed by the Jacobson family. Jacobson was local agent for respondent,

Mosher's disease showed that he might die from its inevitable effect within a short time. The idea to insure Mosher for $10,000 and to get the policy and have it assigned to pay the debt of Mosher to the bank suggested itself readily, and the application was made, and issue of the policy was obtained from the respondent. The first premium payment was for a short term. The annual premium was to be paid in November, 1920. The premium payments were made by the bank. Mosher paid no premiums. The policy was transmitted to Jacobson; it was assigned to the bank forthwith; it was kept in the bank. The first annual premium payment was extended until the fall of 1921, and so was the second annual premium payment. There was one premium payment not paid at the time of the death of the insured, September 10, 1923; its payment had also been extended. There was paid in all about $1,100 in premiums.

Mosher did not die in 1920 or 1921. Financial conditions since 1920 had perceptibly grown worse in North Dakota. Jacobson, in the fall of 1921, conceived the idea to have the policy assigned to himself. His wish was a command to Mosher. Mosher had no interest in the policy. Mosher was the necessary subject for use. During the fall of 1922 conditions were ready for a financial collapse in the personal affairs of Jacobson and Dazey State Bank. Jacobson was in dire financial distress, and he conceived the necessity, or had been prompted, of letting loose of his hold on the policy, and to frame up the scheme to get two $5,000 notes and to have the policy assigned to one of his creditors. Past

experience in getting Mosher to sign papers convinced him that it was feasible. It was done. Renewal notes had to be made of the debts due the bank, also renewal chattel mortgages; the papers were all made up, and C. B. Neal, agent and representative of the petitioner, and Rudolph C. Jacobson, his son, were sent out to the farm home to get the notes and chattel mortgages signed by Oscar Mosher and Sophia Mosher. The parties signing were told that the notes had to be renewed, and the papers were there for them to sign, and that was all that they had to do, and they did it. It meant another year of delay in paying, and in bending their backs to the task of paying for the wife and children. There was no consideration, no promise made, and the two $5,000 notes were but scraps of paper.

C. B. Neal or Jacobson, who was with him, gathered up the papers after they were signed and brought them back to Dazey State Bank. C. B. Neal, in a forgetful moment, told Maxwell Ladbury during the fall of 1923 about the two $5,000 notes; that he took them out; that they were worthless; that he did not expect to have them signed; that they were signed, to his surprise. The policy was not assigned at that time. The bank closed its doors and was insolvent, placed in charge of a receiver February 26, 1923. The policy was taken from the possession of the bank February 26, 1923, the assignment was dated February 26, 1923; its execution was acknowledged February 27, 1923, by Rudolph Jacobson, a son, as notary public. The two $5,000 notes reached the petitioner bank at Minneapolis, Minnesota, March 2, 1923. The assignment of the

policy was approved at Watertown, South Dakota, March 2, 1923. This approval was subject to the terms and conditions of the policy and without responsibility as to the validity of the assignment. The policy and the assignment were transmitted after March 2, 1923, to someone, but it was finally located in the petitioner bank. This condition was brought to the notice of the respondent in May, 1923. Investigation was made, notice of rescission was served on the insured and the petitioner bank, and offering premium payment return. It was received by the petitioner. Oscar Mosher, then on his deathbed, agreed to the rescission and cancellation of the policy, on condition that the premium payments should be turned over to the party who made such payments. This was about June 1, 1923.

Immediately thereafter petitioner bank took steps to foreclose the pledged property. The sale was made June 28, 1923, and a schedule made of the articles sold, describing the notes and the policy as part of the security sold, stating that respondent had given notice to petitioner of misrepresentation made in procuring the policy and of rescission of the contract and for cancellation of the same. Action was brought some time in June, 1923, against Mosher, receiver of the Dazey State Bank, J. E. Jacobson and petitioner; service was made on a person connected with the petitioner bank as agent or representative, before the sale of the pledged notes; the petitioner did appear specially to question the validity of the service, and the service was set aside. The action was prosecuted to judgment; evidence was submitted orally and by exhibits, and the

policy contract was declared rescinded and canceled and void from beginning, and the judgment provided for return of premium payments, to be deposited with the clerk of courts.

These recitals are made from the facts as shown in the respondent's brief.

It seems unnecessary to comment further that an offer was made at the time of the trial to show, by the witness, J. J. Bell, who approved the assignment, that he did not know the conditions under which the policy issue and assignment were made and presented, and that he would not have approved the assignment if he had known the truth of the conditions.

The district court, in its memorandum, states: "The facts alleged in the proposed amendment to the answer to the amended complaint, in my judgment, have a bearing upon the questions whether plaintiff has any ownership in the policy in question, and if it has, whether the ownership is a general or limited one."

The circuit court of appeals stated: "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey State Bank on May 14, 1920, and that the court erred in excluding the tendered proof."

The record of facts shows the taking of property, in the shape of a policy by Jacobson from the respondent by fraud and deceit, and it shows the obtaining of the two $5,000 notes by fraud and without consideration. Both acts are felonious and against the provisions of law in North Dakota and in the United States.

The petitioner has possession of the policy and the assignment, obtained by unlawful acts. Possession of the policy was acquired sometime after March 2, 1923; the possession of the notes mentioned in the assignment came to the petitioner bank March 2, 1923; the petitioner had notice of the rescission of the policy before the foreclosure of the pledged property was made. The petitioner had service of summons and complaint made on it for the cancellation of the policy and for the return of premium payments. The petitioner contends this is not an issue on a wager policy, but it was a wager, taken on an illegal claim, with the chance for petitioner to win. The petitioner had no claim against Mosher, except the debt owed by Mosher to the Dazey State Bank. That claim was $2,010.86. There was another unpaid note in the amount of $682.98 in the Dazey State Bank, signed by Mosher and his wife, when the bank closed, and this passed to the bank department in charge of closed banks in North Dakota, which is shown as Exhibit 6 (R., 185). This exhibit speaks volumes relating to the making of the notes at the farm home of Oscar Mosher and Sophia Mosher, out of Dazey, North Dakota, January 13, 1923.

The petitioner wants payment from Sophia Mosher of the note for $2,010.86, made January 13, 1923, according to letter dated March 5, 1923, signed by J. H. Sharpe, assistant cashier, and "to get in touch with our agent, C. B. Neal, who is now in Dazey." (See Defendant's Exhibit 7; R., 185.)

An insurance company cannot pay a claim of this kind without stultifying itself, and it owes it to society

and to the policyholders and to the stockholders of the company to throw the light upon the transaction as it is and to maintain the principles of honesty and for the triumph of right.

Brief on Issues of Law.

The main question, and only one, on which the petitioner relies for a reversal of the opinion of the Circuit Court of Appeals of the Eighth Circuit relates to "the extent of insurer's liability on the proof and the tendered and rejected proof." The opinion was delivered by Circuit Judge Lewis; the decision was filed April 12, 1927, reversing the judgment of the district court and remanding the action for trial. The decision is based upon the condition at its inception, that the Dazey State Bank had an insurable interest as creditor of the insured, otherwise it would have been a wagering contract and void, because against public policy, citing: Crotty *vs.* Union Mutual Insurance Co., 144 U. S., 621; 36 L. Ed., 566; N. Y. Life Ins. Co. *vs.* Armstrong, 117 U. S., 591; 29 L. Ed., 997; Warnock *vs.* Davis, 104 U. S., —; 26 L. Ed., 924; Conn. Mutual Life Ins. Co. *vs.* Schaefer, 94 U. S., 457; 24 L. Ed., 251; Gordon *vs.* Ware Nat'l Bank, 132 Fed., 444. Many State courts have passed on this condition of an insurable interest, and the contract being a wager and void on that account. The offer of proof in this case warrants the statement that the claim of the petitioner is one obtained by trick and deception in the execution of the two $5,000 notes, without consideration, nearly three years after the policy was issued, and that there

was no obligation on the part of the insured, and that by trick and deception it was the result of the action of the agent and representative of the petitioner, and that the petitioner cannot hold the claim against the respondent under that state of facts, because it would be a denial of justice to get the results of an illegal act on a wager and without having an interest in the life of the insured.

In the action of Thomas *vs.* Conn. Mutual Life Ins. Co. (Kans.), decided July 9, 1927, 257 Pac., 727, on the facts stated: of the issue of a valid 20-payment life insurance policy for $5,000 to Thomas, payable to his estate and assigning the policy to one Hall, as a matter of speculation on the part of Hall, who had no insurable interest in Thomas' life, and as part of the transaction, Thomas executed and delivered to Hall a promissory note for $5,000, payable on demand after Thomas' death, and the note was given without consideration, and six years later Hall executed and delivered to Thomas an agreement to rely entirely on the security of the policy for payment, and Thomas paid the initial premium and Hall paid all subsequent premiums; and dividends having accrued after the policy was paid up in the sum of $2,000, and Thomas sued the insurance company for the dividends; held recovery should be denied on the ground of public policy. In its opinion, the court quotes: "He (Thomas) proved that Hall had no insurable interest in his life; that the note was without consideration, and that he gave the note and assigned the policy to Hall to promote Hall's speculative enterprise. This being true, the assignment was inef-

fectual to accomplish the purpose for which it was executed." Further quoting from the opinion: "Thomas seeks to reap the benefits flowing from Hall's conduct, instigated by Thomas' conduct in executing the invalid assignment. If the assignment were merely illegal in the sense that it lacks authority and support of the law, it might be disregarded, and Thomas might claim the same benefits he would be entitled to if it had not been executed. But such is not the case. The transaction, which included execution of the sham note, execution of the assignment and delivery of the note, and assignment of the policy to Hall, was obnoxious to the public policy of the State. Hall was simply speculating on the length of Thomas' life. At the beginning of the transaction Hall had no interest in the continuation of Thomas' life, and at the conclusion he had a large pecuniary interest in Thomas' early death. Such transactions are regarded as having a mischievous tendency detrimental to our social welfare, apart from simple lack of legal recognition, and the settled opinion of this court is that an assignor and assignee incur equal odium. While the guilty assignee gets nothing, the assignor will not be aided in attempting to avoid the assignment, speculative consequences of his vicious conduct and harvest where he planted no seed, the law leaves him where it finds him; citing: Life Ins. Co. *vs.* McCrum (1887), 36 Kans., 146; 12 Pac., 517; 59 Am. Rep., 537; Ins. Co. *vs.* Elison (1905), 72 Kans., 199; 83 Pac., 410.

The judgment of the district court in favor of Thomas and against the insurance company is reversed

and the cause is remanded, with direction to return judgment for the company. Hall having died and his estate passed the policy to three of his children as residuary legatees, were made parties to the action and were served by publication, did not appear or plead.

In the case before the court the petitioner had been served with the summons and complaint in this action, the petitioner appeared specially to set aside the service and the motion was granted. This was a chose in action, a North Dakota contract; the action was pleaded, involving the cancellation of the contract on its rescission by mutual consent, and the respondent contends that that service was effective and sufficient on the petitioner, and the petitioner should have entered appearance and should have plead its defense, and having failed to do so on the notice acquired by service of summons and complaint, it should be held bound by the decision rendered in the District Court of North Dakota on a North Dakota contract. In that respect the opinion rendered by the circuit court of appeals, quoting from that decision, "That court found that the policy was canceled by mutual agreement of Mosher and the insurance company."

The claim made by petitioner that the indebtedness of the insured to the Dazey State Bank, at the inception of the policy, or the assignment of the policy to that bank, is not contained in the substituted pleading, is not correct; it is referred to in the proposed amended answer to the amended complaint in paragraphs I, III, VI and VII (R., 56-57), and is *admittedly* contained in that part of the answer to the amended complaint

which was stricken by the court. The parts so stricken from the answer to the amended complaint are a part of the record, as shown in this respondent's brief.

Petitioner takes the position that this matter was not subject to review, for the reason that no exception was taken by the respondent or preserved by incorporation in the bill of exceptions, citing cases. The bill of exceptions did assign striking parts of that answer as error, and the respondent's brief before the circuit court of appeals did cite: "No exception, or bill of exceptions is necessary to bring up for review a ruling of a Federal circuit court sustaining a demurrer to one of the defenses set up in the answer, there being nothing in the record to indicate a waiver of defendant's rights; therefore, we must consider the merits of that defense. Denver *vs.* Home Savings Bank, 236 U. S., 104; 59 L. Ed., 485; Nalle *vs.* Oyster, 230 U. S., 165; 57 L. Ed., 1439-1443; 33 Sup. Ct. Rep., 1043.

The appellate court, as a rule, can and does consider on a writ of error, the question, if there is subsequent evidence to support the judgment, and if there is not, the error is plain and the court may act on the want of evidence to support the judgment without exception taken. Boatmen's Bank *vs.* Trower Bros. Co., 104 C. C. A., 314; 181 Fed., 805.

The rule may be stated that an admittedly true statement of fact objected to as immaterial and irrelevant and objection sustained and exception taken, may support a review as to their sufficiency to support the judgment.

When the evidence is not contradictory in substantial points, the usual method of raising the issue as to the

sufficiency of the evidence to support the judgment, and so to have the facts reviewed, is by each party asking an instructed verdict. Union Nat. Bank *vs.* Oson Lumber Co., 103 C. C. A., 584; 179 Fed., 712, and cases cited: Keeley *vs.* Oplin Hill Consl. Min. Co., 95 C. C. A., 96; 189 Fed., 598; U. S. Rev. Stat., Sec. 700.

When there is an offer to prove a particular fact by witnesses, bill of exception should state the name of the witness, what it was expected to prove by him, the refusal to let the witness testify, the objection to the evidence and ruling thereon. Press Pub. Co. *vs.* Monteith, 103 C. C. A., 502; 180 Fed., 359-360.

The incontestability clause in this policy positively states that the policy is incontestable from date, and all statements made on which the policy was obtained are representations and not warranties, *in the absence of fraud*. In the examination of cases on this proposition not a single case quoted by petitioner or by the court has a similar provision. What is known as the Hurni Co. case, 263 U. S., 167; 68 L. Ed., 235, had an incontestability clause, which reads: "After this policy shall have been in force for one full year from the date hereof, it shall be incontestable," etc. The decisions seem to have turned upon the use of the words "in force," and the court held that the provision admitted of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed.

In the Russ case, 14 Fed. (2d), 27, the language of the clause was: "This policy shall be incontestable after one year from its date of issue, except for non-payment

of premiums." In the Plotner case, reported 48 N. D., 295; 183 N. W., 1000, the clause is: "No oral or written misrepresentation made in the negotiations of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or definite or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the made misrepresentation increases the risk of loss." In neither of these three clauses is there a reference to the quotation, "in the absence of fraud." If the application is a part of the policy, it seems to me even as to the inception of the facts on which the policy is issued, if fraudulent, should and does void the policy, on the ground that the conditions are not true and is a breach of the contract, and if rescission is made and the party in fault is made whole by the return of premium payments, that the contract would be considered canceled on the ground that fraud vitiates and destroys any contract, and no one can gain an advantage by his own criminal act. This should be specially true as to any and all transactions relating to the policy and occurring subsequent to the issue of the policy, and as to its facts the limitations imposed by the incontestability clause is not and should not be a bar.

The circuit court of appeals quoted in its decision: "We think the amount named in the policy in excess of Mosher's indebtedness to the bank (Dazey State Bank) at the time it was issued should be regarded, on the facts and offers of proof, as a wager on his death, and

to that extent void and nonenforceable, because against public policy," quoting: Bromley's Adm. *vs.* Washington Life Ins. Co., 92 S. W., 17; O'Connor's Admr. *vs.* Equitable Life Assurance Society, 186 S. W., 502; Clement *vs.* N. Y. Life Ins. Co., 46 S. W., 561. Respondent also calls the court's attention to construction given on incontestability clauses similar to this: Dakota Life *vs.* Morgan (S. D.), 199 N. W., 43. Offer to show no knowledge of fraud and after getting information of the fraud, immediate steps were taken to rescind and restore what it had received in premium payments, where defense of fraud is made can be considered after expiration of the time fixed for incontestability. Welch *vs.* Union Central Life, 108 Iowa, 224; 78 N. W., 853, policy incontestability clause from date, where defense of fraud is available; rescission was made and judgment was affirmed for company; Regan *vs.* Union Mutual Life Ins. Co., 189 (Mass.), 555; 2 L. R. A., (N. S.), 821; 76 N. E., 217; 4 Ann. Cas., 362; Ritter *vs.* Ntl. Life Ins. Co., 169 U. S., 139; 42 L. Ed., 693; Ntl. Life Ins. Co. *vs.* Rose, 294 Fed., 122.

Petitioner contends that the dictum in Conn. Mutual Life Ins. Co. *vs.* Schaefer, 94 U. S., 457, 462; 24 L. Ed., 251, to the effect that "the amount of insurable interest is the amount of the debt," does not accurately state the law on this subject, citing a number of cases.

In our opinion this holding would be absolutely true, and should be true, if there is no debt for which the policy was issued, or there is no debt to secure for which the assignment was made, or if the debt has been partially paid, or all paid, then the policy should be

payable, and is payable to the beneficiary named in the policy. That seems to be the trend of the decisions, and it seems to be based upon good reason, and justice is done by such construction of the law.

An examination of the Schaefer case shows there was no assignment in that litigation. In the cited case of Insurance Co. *vs.* Mowry, 96 U. S., 544, 545; 24 L. Ed., 674; by petitioner, the decision was given on an oral agreement, which was held invalid and the judgment for beneficiary was reversed. In the cited case of Conn. Mutual Life Ins. Co. *vs.* Lucks, 108 U. S., 498; 27 L. Ed., 800, the facts showed there was a joint policy and the ex-partner was entitled to recover the interest he had in his partners affairs.

The decision of Crotty, plaintiff in error, *vs.* The Union Mutual Life Insurance Company of Maine, 144 U. S., 621; 36 L. Ed., 566, Justice Brewer states: "Without noticing other questions discussed by counsel, it is sufficient to consider that of plaintiff's interest in the policy. It is the settled law of this Court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts of insurance have been repeatedly denounced. In Cammack, Jr., *vs.* Lewis, 82 U. S., 643; 15 Wall., 643 (21 L. Ed., 244), in which a policy of $3,000, taken out to secure a debt of $70, was declared "a sheer wagering policy." Conn. Mutual Life Ins. Co., *vs.* Schaefer, 94 U. S., 457 (24 L. Ed., 251), in which it was stated: "In cases where the insurance if effected by way of indemnity as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of the insurable interest is

the amount of the debt." In Warnock *vs.* Davis, 104 U. S., 775 (26 L. Ed., 924), if a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is *that on payment of the debt*, the creditor loses all interest therein and the policy becomes one for the benefit of the insured and collectable by his executors or administrators. In 2 May Ins. (3d ed.), Section 459-A, the author says: "A creditor's claim upon the proceeds of insurance intended to secure the debt, can go no farther than indemnity, and all *beyond the debt, premiums and expenses*, should go to the debtor and his representatives, or *remain with the company*, according as the insurance is upon life or on property." Central Bank of Washington *vs.* Hume, 128 U. S., 195 (32 L. Ed., 370). The plaintiff (Crotty) alleged that he was creditor AT THE TIME OF THE CONTRACT and at the time of death. The promise of the policy is to pay Michael Crotty, his creditor, if living, and it is contended that this is an admission on the part of the company sufficient to justify a verdict against it. If an admission at all, it is good only as an admission of the date at which it was made, to-wit: THE DATE OF THE POLICY. The relation of debtor and creditor is not a permanent one, like that of parent and child, but one which may vary from day to day, changing both in fact and amount, according to the successive business transactions between the parties. So, admission of proof that the relationship of debtor and creditor existed between two parties at one date is not admission of proof that months there-

after the same relationship and to the same amount subsisted.

Justice between the parties and public policy have denounced wagering contracts and does require that the proof of indebtedness should be DISTINCT AND SATISFACTORY. It would tend to a satisfactory consummation of wagering contracts in insurance, if the mere recital in the policy was held sufficient to sustain a recovery in favor of the alleged creditor.

Invalidity of the Two $5,000 Notes.

The two notes were sham; they were obtained by trickery and deceit; there was no consideration; petitioner, by its agent, obtained the same to J. E. Jacobson to be endorsed to the petitioner; the act was an illegal one; J. E. Jacobson received no credit, no money on the notes; Mosher was not the debtor of any one other than the Dazey State Bank, and was not a debtor to Jacobson or the petitioner; the notes are subject to any defense made by the respondent that would nullify them; the respondent was induced to approve the assignment of the policy, made after the Dazey State Bank closed, not knowing the conditions under which the notes and the assignment were made. If those facts were not known *at the time* the notes were received, it is sufficient to state that they are known now from the testimony and the offer to prove. There was no collateral agreement with reference to the notes and the assignment made pledging the notes and the assignment as the security for the payment of anything. There was an entry only in a so-called

"collateral card record," that the notes and policy were received; there was no showing that it was made by the direction or had the consent of any one. A former agreement dated in February, 1921, was received in evidence, but the evidence shows that the insurance policy and notes were not pledged under that agreement. The witness for the petitioner was precluded from testifying, by the court, for what purpose the bank received the notes and assignment after he had admitted that the notes and insurance policy transaction was by correspondence. He might have talked about it, but did not remember what he said; that there was a letter sent relating to the transaction, but the correspondence was not produced and was not placed in evidence; the showing that there was a special agreement, if any, that petitioner tried to establish, but failed to prove it. Were it offered, it would be, if anything, a limited assignment. The special agreement and the nature of the assignment is not proved. There was no subsequent advance and the evidence was ruled out by the court, on the ground that the proffered testimony as to advances made to Jacobson, showed the advances made after the sale was made under the pledge. No other advances subsequent to the assignment were shown. This transaction is not governed by the law relating to negotiable instruments; the collateral security was non-negotiable; there is no testimony to show that the purchaser is a bona fide purchaser; there is no testimony that the notes were presented within a reasonable time, and not being presented, the holder is not an endorsee in due course.

"Where an instrument payable on demand is negotiated, an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 7096, General Statute, Minnesota, 1923. A demand note negotiated two months and over, after its date, is past due and subject to all defenses. Losee *vs.* Duncan, 7 Johns, N. Y., 70; 5 Am. Dec., 245; Northern Crown Bank *vs.* Natl. Electric Co., Ann. Cas., 1912-A., 476.

The rule is stated in Jones on Collateral Securities, 3d Ed. (1912), at Section 360-A: "Whatever may be the law in the case of chattels in payment of a pre-existing debt, when the debt is thereby discharged, we think that by the weight of authority the pledging of chattels as security for pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the plegee a holder for value." The author cites the decisions of the court of last resort of Massachusetts, Indiana, Pennsylvania and of the United States.

If a third party, without any consideration personal to himself, gives his note to a creditor as collateral for a mere naked debt of another without any circumstances of advantage to the debtor or disadvantage to the creditor, the note is without consideration. Turle *vs.* Sargent, 63 Minn., 211; West Coast Co. *vs.* Bradley, 111 Minn., 343. Fraud in procuring a signature to an instrument by misrepresentation, renders the instrument void, not merely voidable. There is no contract in such case. The defrauded party may deny that he executed it. Aultman *vs.* Olson, 34 Minn., 450; 26 N. W., 451.

Negligence of the defrauded party is not available to the person making the misrepresentation. Aultman *vs.* Olsen, *Supra;* Van Meter *vs.* Nunn, 116 Minn., 444; 133 N. W., 1012. Where a promissory note is procured by fraud and misrepresentation, there is no legal execution nor delivery of it, and it is of no legal force nor effect. Marlatt *vs.* Couture (N. D.), 169 N. W., 582; Stevens *vs.* Barnes (N. D.), 175 N. W., 709. In the case of Stevens *vs.* Barnes, *Supra*: The third syllabus is "fraud, at the inception of the alleged contract and note having been established, the burden shifted to the endorsee to prove by evidence that he was a good-faith purchaser for value, before maturity, without notice." This he has failed to do.

The record in this case shows that the petitioner has failed to show that it received the notes in good faith and for a valid consideration.

The petitioner cannot claim good-faith in obtaining the title to the notes and the assignment, because it had notice of the respondent's claim that the policy was void, had been rescinded, and it had service of summons and complaint, setting up the facts as they were, and asking for the cancellation of the policy. The sale of the pledged property, if it was pledged, was made without notice to the respondent by the petitioner.

Assignment of the Policy.

This assignment was made after the Dazey State Bank closed. This assignment was approved subject to the terms and conditions of the policy and without

responsibility as to the validity thereof on the part of the respondent. This assignment was approved without knowledge of the facts relating to the getting of the notes or the conditions under which the policy was illegally obtained. The respondent obtained the information after the assignment was approved. That all the paid premiums had been made by the Dazey State Bank. There was no necessity, at any time, to consider future premium payments, because of the physical ailment affecting the insured, and from which disease he died. It was only a matter of waiting for a short time for the sure results of a shortened life and probable death of the insured.

Respondent contends that the rights of the assignee correspond to the right that the assignor has and that it is subject to all defenses relating to its validity or force and effect. Courts hold that the validity of the assignment depends upon a bona fide transaction and not on mere speculative insurance and that it is not of a policy issued to circumvent the law against wagering policies. Courts which hold assignments void proceed upon the theory, that it being against public policy to allow to take insurance upon a life in which he has no interest, the same objections exist against an assignment to one having no interest, since the law will not permit that to be done by indirection which it prohibits being done directly.

Good faith in the transaction of an assignment is required, and the courts do not hesitate to condemn a policy issued for the purpose of having it assigned. See valuable note to Metropolitan *vs.* Elison (Kans.),

3 L. R. A., (N. S.), 934; Rahders, Merritt and Hagler *vs.* Peoples Bank of Minneapolis *et als.*, 113 Minn., 496.

The question as to the validity of an assignment of a life insurance policy to one who has no insurable interest in the life of the insured has been held to be one dependent on general law as to which the Federal courts should exercise an independent judgment. Kopetovske *vs.* Mutual Life Ins. Co., 187 Fed., 499; 111 C. C. A., 265; 27 Ann. Cas., 865.

And this is true even where the assignee purchases at a judicial sale. Irons *vs.* U. S. Life Ins. Co., 108 S. W., 904 (Ky.); 129 Am. St. Reps., 318.

An assignment must be in good faith, and not a mere colorable evasion of the law in regard to wagering contracts, before it will be upheld by a court. Clement *vs.* Insurance Co., 101 Tenn., 20; 70 Am. St. Rep., 630; Keystone, etc., Ben. Assn. *vs.* Norris, 115 Pa. St., 446; 2 Am. St. Rep., 572.

It also seems to be generally held that the assignee is entitled to recover the sums actually advanced by him upon the policy, even though the assignment may be void as to the proceeds in excess of such advancement. Cammack *vs.* Lewis, 15 Wall. (U. S.), 643; Warnock *vs.* Davis, 104 U. S., 775; Cawthon *vs.* Ferry, 76 Tex., 338; Lewy *vs.* Gilliard, 76 Tex., 400; Raller *vs.* Beam (Va.), 6 L. R. A., 136; Basye *vs.* Adams, etc., 81 Ky., 375; Weisert *vs.* Muehl, 81 (Ky.), 341.

Where a debtor made several assignments of one fund, the second assignment being given merely to secure loans already made, *and no further* loans being made in reliance thereon, the second assignment is not

one for a valuable consideration, and the second assignee cannot claim priority though taking without notice of the first assignment. Davis *vs.* Coggin *vs.* State Bank of El Paso, 156 S. W., 321 (Texas); 5 *C. J.*, Sec.. 90, p. 931.

Assignee has no greater right than assignor had. Bellman *vs.* Home Insurance Co., 189 N. W., 1028 (Wis.); 27 A. L. R., 945.

Assignment to first wife, changed by insured to second wife after death of first wife, held that delivery and possession was presumed to have been in first wife and second assignment was void. Devin *vs.* Conn. Mutual, 158 Pacific, 435 (Okla.); L. R. A., 1916 F, 783.

Note of $3,000 given without consideration, except $70 debt and agreement to give $1,000 to the wife, held to be a wager contract, on claim of the wife as administratrix of the estate of the insured, and that it was entitled to balance over what was owed to or advanced by assignee, and that assignee can claim only what was owed or advanced. Cammack *vs.* Lewis, 15 Wall., 643-649; 21 U. S. (L. Ed.), 244.

As to sale of pledge, the doctrine of trust applies to public as well as private sales and where assignee purchases, the assignee is trustee of funds only, and can hold only his interest. Irons *vs.* U. S. Life Insurance Co., 108 S. W., 904 (Ky.); 129 A. S. R., 318.

Approval does not estop company from contesting the validity of the assignment or of the policy. Franklin Insurance Company *vs.* Wolff (Ind.); 54 N. E., 772.

Assignment procured by fraud is void. 37 *C. J.*, Section 143, notes 15 and 16, page 434; 37 *C. J.*, Sec-

tion 336, page 572, "Invalid Assignments Generally" and notes.

The facts in this case are peculiar, the insured and his wife are joint makers of the two notes and of the notes to the Dazey State Bank; the personal property of the widow, Sophia Mosher, is pledged for the payment of the notes renewed to Dazey State Bank; the petitioner holds one of those notes, amounting to $2,010.86; the Banking Department of North Dakota holds another note of $682.98 against Sophia Mosher; both holders have asked for payment by Sophia Mosher; the payment of these two notes appear to be secured by this policy; the policy has been cancelled, so far as to the estate of the insured, in the North Dakota action, and there is no further liability to the estate of the insured; however, there is a liability to the parties holding the two notes and to the co-maker, Sophia Mosher, with Oscar Mosher, for the payment of the said notes. Sophia Mosher was not made a party to the action cancelling the policy, personally, but in a representative capacity only, as administratrix; the North Dakota Banking Department did not appear; J. E. Jacobson died; the receiver of the Dazey State Bank was relieved from duty, and his successor was not served and did not appear; the respondent relies upon the right to rescind and to pay back what it had received in the shape of premium payments; if its contention is correct, then there is a fund of $1,102.20 and interest thereon which could be applied to the payment of the note held by the North Dakota Banking Department and in the event that the assignment to the petitioner,

covering the $2,010.86 note held by it, then the funds consisting of premium payments returned, could be applied proratedly to the two holders of the two notes. If the cancellation of the policy is held not binding on the petitioner, and if it is held that the limited assignment is valid to the extent of the debt of the Dazey State Bank to the petitioner, then the $2,010.86 note held by it as collateral for the debt of the Dazey State Bank would be recoverable from the respondent.

Petitioner cannot claim surprise as to the issue of the wager and non-existence of insurable interest claimed by respondent and decided by the circuit court of appeals on the brief made by the respondent here and plaintiff in error in said circuit court of appeals.

The respondent claims that decision of the circuit court of appeals in this case is a decision only relating to the matter of a wagering contract and that this decision as made, does not preclude consideration of matters interwoven and connected with that decision, relating to the validity of the policy and the validity of the assignment, and that all of the issues had been decided in that one respect only, because all of the facts existing were considered in making the decision. A chain of facts are and were essential to make the decision. The events from the beginning, starting with the application, to the death of the insured, are all matters connected with the transaction as a whole.

The petitioner calls attention to the North Dakota Law, Section 6628 and Section 6631; Section 6628 is the law covering wager contracts as to life insurance in North Dakota; provisions of Section 6631 are not

applicable, for the reason that the testimony offered and testimony admitted, shows that the interest is subject of exact pecuniary measure and for the further reason that it is not a general assignment of the policy but one for indemnity only, upon the life of Oscar Mosher, and the amount thereof is one to be established by the petitioner.

There is no question about the position of the Dazey State Bank; in either holding, that the incontestability clause does or does not exclude a defense, if it does not exclude a defense, there is still $1,102.20 and interest thereon to be distributed for the benefit of the parties holding claims secured by the policy; if it does exclude a defense, then the matter of the payment of the two notes is a liability of the respondent.

Considering the matters in this case from beginning to the present time, I feel like observing that the legislation on insurance relating to fraud and incontestability clauses, and the varied policy clauses made in the past and up to the present time on the two propositions, and the decisions rendered thereon by courts of last resort in this State and in the United States resembles the labyrinth of King Minos of Crete, from which there is no escape, or resembles a knot, that cannot be untied by strength of mind, and when you consider the multitude of laws and of cases cited, having a bearing on the facts in this case and the law applicable thereto, it is a Herculean task for mind and time. There is, however, a matter of simplicity about it, if considered, free from the maze of law, contract provisions, by the ordinary man making himself con-

versant with the facts, he could tell what is right and what is wrong in this case.

The divine law forbids taking property from others; the human law makes the taking of others' property, by stealth, if the value is in excess of $20.00, a felony; the taking of $10,000 from the respondent in this case would make it a breach of divine and human law.

The claim comes garbed in shoddy clothes, made up of many worn-out decisions and based upon many odds and ends of laws and repeals. When Christ found the money changers in the temple plying their trade, he was aroused to wrath and drove them out of the temple (the house of justice), and said "This is the house of God (justice), you have made it a den of thieves."

Respondent respectfully asks the court to affirm the judgment of the circuit court of appeals.

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